FILED BY CLERK
MAY 14 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RONNIE MARTINEZ CORELLA, Appellant.	2 CA-CR 2009-0241 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083856

Honorable Howard Hantman, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Liza-Jane Capatos
Phoenix
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Ronnie Corella was convicted of driving under the influence of an intoxicant (DUI) and aggravated DUI with an alcohol concentration of

.08 or greater while his license was suspended. The trial court suspended imposition of sentence, placed him on five years' probation, and ordered him to serve four months in prison as a condition of probation. On appeal, Corella argues the court erred in denying his motion to suppress evidence.[1] He also alleges a single instance of prosecutorial misconduct denied him a fair trial. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 On September 14, 2008, at around 2:00 a.m., Tucson Police Officer Albert Espinoza was dispatched in a police helicopter to the area of 29th Street and Craycroft to search for a black Cadillac that had fled from another officer. While trying to locate the Cadillac, Espinoza noticed a different car had stopped on 27th Street with its parking lights on. He observed the car drive west to the end of the block, turn around and drive east to the other end of the block, then turn around again, drive west, and stop at the point where Espinoza initially had seen it. He contacted officers on the ground and requested that they check on the car. He kept the car in sight until a patrol officer, Robert Peterson, pulled up behind it.

¶3 Peterson parked his patrol car approximately one car length behind the vehicle and approached on foot. He saw Corella lying in the driver's seat, which was fully reclined. Corella was holding car keys in his right hand, a cellular telephone in his left hand, and his eyes were open. When Peterson knocked on the window, Corella sat

[1]In his motion below Corella moved "for an order to dismiss, or in the alternative, to suppress evidence as a result of an illegal stop and arrest." However, he has not challenged on appeal the court's refusal to dismiss the charges. Any such argument is therefore abandoned. *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004).

up and said, "[N]o, I'm not." Peterson noticed that Corella's eyes were watery and bloodshot and detected an odor of alcohol coming from inside the car. He asked Corella for identification, and Corella identified himself as "Ron Martinez." He also gave a false date of birth and social security number.

¶4 While Peterson was conducting a computer check of the information Corella had provided him, other officers approached Corella's car. Corella attempted to make a call from his cellular telephone and refused the officers' requests to relinquish the telephone. A struggle ensued, during which the officers fired "pepper balls" into the car and pulled Corella out of the car and onto the ground. After Corella refused to perform field sobriety tests, he was arrested and agreed to submit to a blood draw.

¶5 Corella subsequently was indicted on three counts: (1) aggravated DUI with a suspended or revoked license, (2) aggravated DUI with an alcohol concentration of .08 or more with a suspended or revoked license, and (3) resisting arrest. During trial, the trial court granted Corella's motion for a judgment of acquittal on the resisting arrest charge pursuant to Rule 20, Ariz. R. Crim. P., finding Corella was not under arrest when the physical altercation with the officers had occurred. The jury acquitted him of the first count, but found him guilty of the lesser included offense of DUI and the second count of aggravated DUI. Corella was sentenced as noted above and this appeal followed.

Discussion

Motion to Suppress

¶6 Corella argues the trial court erred in denying his motion to suppress "because he was stopped without reasonable suspicion and arrested without probable

cause." "In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We review a trial court's determinations of probable cause and reasonable suspicion de novo, but review its findings of fact for clear error and give due weight to any inferences it draws from those facts. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *see also State v. Olm*, 223 Ariz. 429, ¶¶ 7, 9, 224 P.3d 245, 248 (App. 2010).

¶7 "An investigatory stop of a vehicle constitutes a seizure under the Fourth Amendment" and must be supported by an officer's reasonable suspicion that the individual to be detained is involved in criminal activity. *Fornof*, 218 Ariz. 74, ¶ 5, 179 P.3d at 956. However, a voluntary encounter with an individual in a stationary vehicle does not implicate the Fourth Amendment if "'the police conduct would have conveyed to a reasonable person that he or she was . . . free to decline the officer's requests or otherwise terminate the encounter.'" *State v. Canales*, 222 Ariz. 493, ¶ 6, 217 P.3d 836, 838 (App. 2009), *quoting United States v. Hernandez*, 93 F.3d 1493, 1498 (10th Cir. 1996); *see also People v. Paynter*, 955 P.2d 68, 72 (Colo. 1998); *State v. Reason*, 951 P.2d 538, 542-43 (Kan. 1997); *Rice v. State*, 100 P.3d 371, ¶ 25 (Wyo. 2004).

¶8 In *Canales*, we concluded that the defendant, who had been sitting in his parked car, reasonably would not have believed he was free to "'disregard the police and go about his business,'" when the officer had parked his patrol car so that it was "physically impossible for [the defendant] to terminate the encounter by leaving in his vehicle." 222 Ariz. 493, ¶ 8, 217 P.3d at 838, *quoting California v. Hodari D.*, 499 U.S.

621, 628 (1991). Here, however, Peterson parked his vehicle a car's length away, approached Corella's car on foot, and tapped on his window. The evidence presented at the suppression hearing supports the trial court's finding that Peterson "did not perform a stop when [he] approached [Corella]'s parked vehicle, therefore, [his] actions did not require reasonable suspicion."

¶9 Corella also contends the trial court erred in denying his motion to suppress because he was "arrested without probable cause." He acknowledges he did not raise this argument below. We therefore review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Rojers*, 216 Ariz. 555, ¶ 13, 169 P.3d 651, 654 (App. 2007) (argument not raised in suppression motion or at suppression hearing subject to fundamental error review). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show that error occurred, that it was fundamental, and that it caused him prejudice. *Id.* ¶¶ 19-20.

¶10 An arrest is justified when probable cause exists to believe the person being arrested has committed an offense. *State v. Emery*, 131 Ariz. 493, 506, 642 P.2d 838, 851 (1982). And to commit an offense under Arizona's DUI statutes, a defendant must be "under the influence of intoxicating liquor" while "driv[ing] or . . . in actual physical

control of a vehicle." A.R.S. § 28-1381; *see also State v. Zavala*, 136 Ariz. 356, 358, 666 P.2d 456, 458 (1983) (discussing prior version of DUI statute).

¶11 In finding the officers had probable cause to arrest Corella, the trial court relied on his "statement, 'No, I am not,' his red watery eyes, his failure to cooperate with law enforcement, his provision of false identifying information to law enforcement, his refusal of field sobriety tests and the odor of intoxicants from his vehicle." On appeal, Corella does not challenge the court's finding that the officers had probable cause to believe he was under the influence of intoxicating liquor. Instead, citing *Zavala*, he maintains the officers "did not have . . . probable cause to arrest him because he had pulled over to the side of the road and was evidently resting," and thus was not in actual physical control of his vehicle. We disagree.

¶12 In *Zavala* our supreme court held that impaired individuals cannot be prosecuted for DUI when they have relinquished actual physical control of the vehicle by pulling their car off the road, turning off the ignition, and they are physically incapable of restarting the car. *Id.* But in *State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995), the court abandoned a bright-line approach based on *Zavala* in favor of an approach that would "allow the trier of fact to consider the totality of the circumstances in determining whether defendant was in actual physical control of his vehicle." Most recently, the court found that even an individual's "potential use" of the vehicle amounted to "actual physical control when, under the totality of the facts, the person 'posed a threat to the public by the exercise of present or imminent control' over a vehicle 'while impaired.'" *State v. Zaragoza*, 221 Ariz. 49, ¶ 17, 209 P.3d 629, 633 (2009), *quoting Love*, 182 Ariz.

at 326-27, 897 P.2d at 628-29. Here, a reasonable jury could have concluded Corella was in actual physical control when he had been seen driving minutes before Peterson approached him;[2] had parked next to the curb but on the roadway; had been sitting in the driver's seat, holding the keys to the ignition in his right hand; and his eyes were open. *Id.* ¶ 21 (providing jury instruction listing factors jurors may consider in determining whether defendant in actual physical control of vehicle). Thus, the facts here were sufficient to establish probable cause. *See Emery*, 131 Ariz. at 506, 642 P.2d at 851. The trial court therefore did not err, fundamentally or otherwise, in denying the motion to suppress on this ground.

¶13 For the first time in his reply brief, Corella contends the officers lacked probable cause to arrest him because they "had no evidence whether [he had] consumed alcohol before or after stopping." "We do not address arguments raised for the first time in a reply brief and that are not adequately developed or supported with authority." *State v. Payne*, 223 Ariz. 555, n.2, 225 P.3d 1131, 1136 n.2 (App. 2009); *see also State v. Watson*, 198 Ariz. 48, ¶ 4, 6 P.3d 752, 755 (App. 2000); Ariz. R. Crim. P. 31.13(c)(1)(vi), (3).

Prosecutorial Misconduct

¶14 Corella argues that "the prosecutor committed misconduct by telling the jury [during closing arguments] that he thought it was the right thing to convict [him]." To warrant reversal on the basis of prosecutorial misconduct, a "'defendant must

[2]From his vantage point in a police helicopter, Espinoza observed Corella's vehicle being driven and directed the arresting officers to its location, where they found Corella, its sole occupant, in the driver's seat.

demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . [T]he conduct [must] be so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *State v. Roque*, 213 Ariz. 193, ¶ 152, 141 P.3d 368, 403 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). And where, as here, a defendant does not object to a prosecutor's statements, we review for fundamental, prejudicial error. *Hernandez*, 170 Ariz. at 307-08, 823 P.2d at 1315-16.

¶15 In his closing argument, defense counsel urged the jury to find Corella not guilty, asserting that "[s]ometimes a group of people stand up and say this isn't right, I'm not going to stand for it. Sometimes it's a village, sometimes it's one person that says no, no, I won't, no it's not right." In rebuttal, the prosecutor argued, "It's true that the prosecutor is going to ask you to convict if you think it's the right thing. . . . I'm asking you to find him guilty . . . because it's the right thing. The State has met the burden of proof."

¶16 "Expressions of the prosecutor's personal opinions as to a defendant's guilt or innocence are improper. However, prosecutorial comments which are fair rebuttal to areas opened by the defense are acceptable." *Id.* (citation omitted). Although Corella argues the prosecutor's comment constituted improper prosecutorial vouching, we agree with the state that it was "a direct response to opposing counsel's appeal to the jury" and thus proper rebuttal to Corella's argument. Even assuming that the prosecutor's comment was improper, "Arizona courts have held that an instruction explaining to the jury that lawyers' arguments are not evidence has ameliorated instances of prosecutorial

vouching more egregious than occurred here." *See State v. Lamar*, 205 Ariz. 431, ¶ 54, 72 P.3d 831, 841-42 (2003); *see also State v. King*, 110 Ariz. 36, 43, 514 P.2d 1032, 1039 (1973); *State v. Taylor*, 109 Ariz. 267, 274, 508 P.2d 731, 738 (1973); *State v. Dillon*, 26 Ariz. App. 220, 223, 547 P.2d 491, 494 (1976). And here, the trial court instructed the jury, "In the opening statements and closing arguments the lawyers have talked about the law and the evidence. What the lawyers said is not evidence. . . . You must find the facts from the evidence." We presume that the jurors followed the court's instructions. *State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006). We therefore are not persuaded that Corella was prejudiced by the prosecutor's comment.[3] *See Hernandez*, 170 Ariz. at 307-08, 823 P.2d at 1315-16.

Disposition

¶17 For the reasons stated above, we affirm Corella's convictions.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

[3]For the same reasons, we are not persuaded by Corella's related argument that he necessarily was prejudiced because the jurors returned inconsistent verdicts on the two charges involving the element of driving with a suspended license and were thus "uncertain of the conclusion."